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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RYAN ALEXANDER JAMES KRON, Defendant and Appellant.	G056366 (Super. Ct. No. 17CF0203) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Elizabeth G. Macias, Judge. Affirmed.

Donna L Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

A jury convicted defendant Ryan Alexander James Kron of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c); all further references are to this code unless otherwise stated) and violating a protective order (§ 273.6, subd. (a)). The court denied probation and sentenced defendant to a term of three years in prison for the robbery, stayed sentence on the protective order violation (§ 654), imposed certain standard and mandatory fines and fees, and issued a postjudgment protective order.

We appointed counsel to represent defendant on appeal. Counsel initially filed a brief summarizing the proceedings and facts of the case and advising the court she found no arguable issues to assert on defendant's behalf. (*Anders v. California* (1967) 386 U.S. 738; *People v. Wende* (1979) 25 Cal.3d 436.) To assist us in our independent review, counsel suggested we consider three issues which we will discuss below.

Defendant later filed a supplemental brief on his own behalf, that raised other issues which we will also discuss below.

We then invited the parties to brief the issues raised by the defendant and the issues suggested by counsel. Defendant's counsel filed a supplemental opening brief with arguments on the merits of one of the issues suggested in her initial opening brief. Respondent's counsel elected not to file a supplemental brief.

FACTS AND PROCEDURAL HISTORY

We recite the facts in the light most favorable to the judgment, drawing all reasonable inferences in support thereof. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 47-48.)

Defendant and S.K. were married and had one child, M.K., who was born in 2013. They separated in January 2015. Both parents wanted custody of M.K. S.K. wanted to raise M.K. on her own because she was "concerned" for M.K.'s safety. While divorce proceedings were pending, S.K. and defendant went to family court to try to resolve their custody issues. The divorce and custody proceedings were contentious.

After more than a year in family court, M.K. was removed from the custody of both parents. Defendant and S.K. then attended court proceedings in dependency court. Defendant and S.K. were each allowed visitation with M.K. The dependency case was set for trial on January 25, 2017.

On January 23, 2017, the day before the robbery, S.K. called and spoke to defendant. At that time, S.K. was the subject of a protective order that prohibited defendant from contacting her. S.K. was, however, allowed to initiate peaceful contact with defendant.

On January 24, S.K. received a Facebook message from defendant. He wrote, "I just want to know why all of a sudden two days before court you call and ask me all these questions and tell me you're not recording me." That evening, S.K. took an Uber to her home in Orange after a visit with M.K. S.K. arrived at her house between 8:15 and 8:30 p.m. It was dark outside.

S.K. was listening to music when she got out of the Uber car. She had her cell phone in her right hand and headphones in her ears. S.K. noticed someone was on the side as she got out of the car, but she did not pay much attention. S.K. started walking from the street toward her door at the back of the building. S.K. looked up and saw defendant walking toward her. Defendant was wearing a hoodie with the hood pulled over his head. Defendant was not supposed to know her address.

S.K. started backing up when she saw defendant. S.K. told him repeatedly that he was scaring her. Defendant went up to S.K. and grabbed S.K. by her left arm, pulling her toward him. Defendant told S.K., "Listen to me, I have a gun. Listen to me, I have a gun." S.K. never knew defendant to own a gun.

S.K. was terrified. She did not see a gun but saw defendant reach one hand in the front of his sweater. S.K. was pulling and trying to back away from him. He grabbed the strap on her purse, pulled the purse off her right shoulder and ran away with it. The entire incident happened in a matter of seconds. S.K. was panicked and scared.

S.K. used her cell phone to call 911. Officers Haasch and Gutierrez responded to the call. The officers contacted S.K. who was crying and yelling loudly. S.K. told the officers that defendant was wearing jeans and a gray sweater.

S.K. told Haasch she had $50 cash in her purse, along with her driver's license, debit card, Social Security card, and makeup. S.K. did not recall the value of the purse but said she spent approximately $100 to purchase the makeup. She also paid a fee to replace her driver's license.

Haasch next spoke to E.A., a boy who was standing nearby and witnessed the incident. E.A. told Haasch he was walking his dog when he saw a man approach S.K. E.A. described the man as having blond hair and being five feet six inches or five feet eight inches tall. Haasch, who is five feet eleven inches tall, asked E.A. if he thought the suspect was taller than Haasch. E.A. responded "Same size; similar."

Haasch and other officers went from Orange to defendant's home in Dana Point that same night. After getting a statement from defendant, Haasch placed him under arrest. Haasch searched defendant and recovered a cell phone.

Haasch did not find a purse or a gray hooded sweatshirt on defendant, at defendant's home or in defendant's car. No other officer reported finding either a gray sweatshirt or a purse.

E.A. testified he was 14 years old and in the ninth grade at the time of trial. Around 8:30 p.m. on January 24, 2017, E.A. was walking his dog around the neighborhood. E.A. looked up when his dog barked and saw S.K. get out of a car. E.A. was about 15 feet away from S.K.

E.A. saw a man grab S.K.'s shoulder. The man was "yelling and talking." It appeared to E.A. that S.K. did not realize the man had been approaching her. S.K. froze and tried to push the man away. S.K. told the man, "Stop. You're scaring me." The man said, "I have a gun" as he reached for his back pocket or behind him. E.A. did not see a gun. S.K. "gave up." The man then took S.K.'s purse and ran down the street.

E.A. described the suspect as a white male with blonde or light brown hair. The male wore a gray hoodie, with the hood covering his head, and baggy blue jeans. The male was five feet eight inches to six feet tall and weighed about 160 pounds. E.A. could not identify defendant at trial.

The parties stipulated a valid, active restraining order was in effect in January 2017. The order prohibited defendant from having any direct or indirect contact with S.K. Defendant was ordered not to "Harass, attack, strike, threaten, assault, hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, impersonate, (on the internet, electronically or otherwise), or block movements." There was an exception for peaceful contact between the parties if initiated by S.K. and if required for court-ordered visitation with M.K. The terms of the restraining order were agreed upon by defendant and S.K.

Defendant testified on his own behalf. Defendant and S.K. were in the middle of divorce proceedings. In the family court, both parties were fighting to get custody of M.K. The custody proceedings were contentious. Defendant wanted custody of M.K. but also believed M.K. deserved to have both parents in her life.

After the County of Orange took custody of M.K., defendant and S.K. went to hearings in dependency court. The dependency case was set for trial on January 25, 2017. The dependency trial was very important to defendant because if all went well on January 25, he would regain custody of M.K. Defendant admitted a conviction for misdemeanor petty theft in 2004.

On January 23, defendant received a phone call from S.K. On January 24, defendant sent S.K. a Facebook message asking, "I just want to know why all of a sudden two days before court you call and ask me all these questions and tell me you're not recording me."

Defendant had a gut feeling based on previous experience that S.K. had recorded the call on January 23. He denied he was concerned that any recording of the

call could negatively impact the trial on January 25. There was not anything negative about M.K. in the conversation. Defendant denied going to S.K.'s home on January 24. Defendant testified he did not know where S.K. lived and would not have violated the restraining order. He worked really hard to get M.K. returned to him and would not do anything that would "mess that up."

On January 24, defendant worked from 8:00 a.m. to 3:30 p.m. Defendant went from work to the Orange County Social Services Agency across from Lamoreaux Justice Center for a visit with M.K. and his parents from 4:30 to 5:50 p.m. Defendant went from the visit with M.K. to the home of his friend Ryan Mathis in Laguna Niguel.

Defendant and Mathis had been friends for approximately 17 years. Mathis was a potential witness in the dependency trial. Mathis and defendant played video games and talked about what was going to happen in the following days. Defendant was at the Mathis home from approximately 6:30 p.m. to 9:00 p.m. He then drove straight home to Dana Point.

Officers came to defendant's home to arrest him. Defendant twice told Haasch he was at Mathis's house that evening. Defendant gave the officer Mathis's full name and told him Mathis's phone number could be found on his phone. Defendant had no contact with Mathis after his arrest.

DISCUSSION

We have independently reviewed the entire record according to our obligations under *Anders v. California*, *supra*, 386 U.S. 738 and *People v. Wende*, *supra*, 25 Cal.3d 436, and we have considered counsel's suggestions and defendant's supplemental arguments, but we have found no arguable issues on appeal.

(1) Counsel suggests we consider: "Whether the trial court erred by failing to instruct [the jury] on unanimity as requested by defense counsel where the prosecutor introduced evidence of two discrete acts that may have been charged separately as violations of the protective order." (Capitalization omitted.)

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation]" (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

Here, the information charged, and the court instructed the jury, the alleged protective order violation occurred on or about January 24, 2017. But the evidence established two acts on that date which could constitute the crime charged—the Facebook message and the robbery. Recognizing the issue, defense counsel requested a unanimity instruction. The prosecutor thought it should be given too, though she later argued to the jury the violation occurred when defendant went to S.K.'s house and robbed her. The court agreed to consider but then did not give a unanimity instruction for reasons which are not disclosed by the record.

Assuming failure to give the instruction was error, no prejudice resulted. The jury found by its robbery verdict that defendant did take property from S.K. on or about January 24, 2017. This verdict necessarily implies the jurors unanimously agreed that encounter violated the protective order. Thus, no prejudice could have resulted from the omission of the unanimity instruction, and defendant's claim of error fails.

(2) Counsel suggests we consider: "Whether the trial court erred by failing to instruct the jury on theft from the person as a necessarily lesser-included offense of robbery." (Capitalization omitted.)

"The trial court must instruct on general legal principles closely related to the case. This duty extends to necessarily included offenses when the evidence raises a question as to whether all the elements of the charged offense are present. [Citation.] It is settled that the crime of theft, whether divided by degree into grand theft or petty theft, is a lesser included offense of robbery. [Citation.] Robbery includes the added element of force or fear. [Citation.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 50 (*DePriest*).)

"Nevertheless, 'the existence of "any evidence, no matter how weak," will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citations.]" (*DePriest, supra,* 42 Cal.4th at p. 50.)

In this case, no substantial evidence established defendant committed only grand theft and not robbery. S.K. identified defendant as her assailant. Defendant denied being her assailant and mounted an alibi defense. Neither defendant's testimony nor any other evidence suggested defendant took S.K.'s property without using force or fear. Thus, the trial court did not err in failing to instruct the jury sua sponte on grand theft (theft from person) as a lesser included offense of robbery.

(3) Counsel suggests we consider: "Whether the trial court abused its discretion by overruling defense counsel's objection and admitting S.K.'s nonresponsive answer that she did not want [defendant] to have custody of M.K. due to her concern for the safety of M.K." (Some capitalization omitted.) Counsel also argues the prejudicial impact of this evidence outweighed its minimal probative value. We disagree.

Before trial, defense counsel moved to exclude evidence of prior domestic violence allegations against defendant, including references to two pending criminal cases and the basis of the protective order prohibiting him from contacting S.K. The trial court granted the motion. The prosecutor later advised the court, in S.K.'s presence, she had admonished S.K. accordingly. The court also admonished S.K. to pay close attention to the question and answer the question without adding anything more.

Despite the admonitions from the prosecutor and the trial court, during cross-examination by defense counsel, S.K. twice volunteered information suggesting defendant had engaged in prior acts of violence involving M.K.

Defense counsel was attempting to establish that S.K. had a motive to lie when he asked her: "Fair to say that you, at that point, wanted to raise [M.K.] without

[defendant]? And what I mean by that is, on your own?" S.K. answered with a question, "Due to the event prior to that?" Defense counsel clarified, "That's not what I'm asking about." S.K. responded, "For her safety, yes." Defense counsel objected on nonresponsive grounds and the court overruled that objection.

A short time later, defense counsel asked S.K.: "But the bottom line is though, yes or no, you did not want [defendant] to have custody of [M.K.]?" She replied, "As I stated earlier, at that point, no."

When she was asked to agree that she did not want defendant to have custody of M.K., she answered, "For her safety, yes, I would." Defense counsel objected and moved to strike on nonresponsive grounds. After an unreported sidebar discussion, the court overruled the objection.

On appeal, counsel does not argue the trial court erred by overruling the nonresponsive objections per se. Instead, she argues the trial court abused its discretion under Evidence Code section 352, "by overruling [defendant's] objections to S.K.'s testimony that she was concerned about the safety of 4-year-old M.K with [defendant] due to what happened during a prior event." We are not persuaded.

We note nothing in the appellate record shows defendant's trial counsel ever objected to the challenged testimony under Evidence Code section 352. Therefore, defendant forfeited his right to complain about the allegedly erroneous admission of the evidence on this specific ground. (Evid. Code, § 353; *People v. Doolin* (2009) 45 Cal.4th 390, 433, 438; *People v. Partida* (2005) 37 Cal.4th 428, 433.)

In any event, '"We will not disturb a trial court's exercise of discretion under Evidence Code section 352 '"*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'"' [Citation.]" (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 480.) The trial court's admission of the challenged testimony was none of those things.

(4) Defendant argues: "I was charged with 2 crimes (211/212.5 (c)) my sentence was for Second Degree Robbery which should of only have been 212.5(c) as said in the penal code."[1]

Defendant's improper sentence argument is simply mistaken. Section 212.5, subdivision (c) defines second degree robbery as follows: "All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree." Section 213, subdivision (B)(2) states: "Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years." Applying these statutes here, the trial court imposed the middle term of three years for the second degree robbery conviction. In doing so, the court did not err.

(5) Defendant argues: "I challenge the sufficiency of evidence. I so much Beyond Reasonable Doubt that I feel the court needs to look at it. Such as: [¶] A) [S.K.'s] Testimony does not 100% match up to her last. She can remember where her purse is located and so forth. [¶] B) The teenage boy was asked if he sees the suspect in the court room, and he said 'NO' [¶] C) The officers testimony he failed on giving a correct statement so he falsified that, they also searched my house, car and myself and found nothing. [¶] Which brings me to Im understanding the fact the Jury heard the evidence and still made up there mind but if brings me to my next point."

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one." (*People v. Smith* (2005) 37 Cal.4th 733, 738.) "Our role when reviewing the sufficiency of the evidence is to evaluate the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Ramos* (2016) 244 Cal.App.4th 99, 104.) We view the record in the light most favorable to the judgment,

[1] We quote defendant's arguments verbatim, with spelling and punctuation errors.

resolving all conflicts and indulging all reasonable inferences in support of the judgment. If more than one inference may reasonably be drawn from the evidence, we accept the inference supporting the judgment. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. [Citation.]' [Citation.]" (*Ibid.*)

The evidence in the record is sufficient to support the jury's verdicts. Defendant's contrary arguments ignore the limited nature of our review. He essentially asks us to make credibility determinations and reweigh the evidence, thereby substituting our judgment for that of the jury. This we cannot do. "That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

(6) Defendant argues: "I was stuck with a biased Jury or bad timing. My hearing was during spring break most of the Jury were college kids. Also we are/were in the middle of the #METOO movement, making women look like more victims in all cases. Not just the current publized ones, and my heart goes out to them but this is not that type of case."

Defendant's assertions are not part of the appellate record and thus cannot be reviewed on direct appeal. (*People v. Kelly* (2006) 40 Cal.4th 106, 126 (*Kelly*).)

(7) Defendant argues: "The jury wanted to hear the 911 recording again. The transcript of that recording does not match. You can at the very end hear [S.K.] say something about her bank accounts which is not included. So I feel that evidence should not have been admitted. This error prejudiced me curicially."

This argument insinuates the court refused the jury's request to hear the 911 recording again. Not so. During deliberations the jury summitted the following request: "Can we listen to the entire 911 call?" The court ruled and the minutes reflect the court

responded to the jury in writing: "The jury may hear the 911 call in its entirety." Thus, the jury heard the 911 call twice.

To the extent defendant is arguing the jury should not have been given a transcript of the 911 call, nothing in the appellate record shows defendant's trial counsel ever objected to it. Consequently, defendant again forfeited his right to complain. On the merits, a trial court has broad discretion in determining whether to admit or exclude evidence. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) As a result, we review a trial court's rulings regarding the admission or exclusion of evidence on the ground of relevance for an abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) "'[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*Mullens*, at p. 658.) No such abuse of discretion has been shown.

(8) Defendant argues: "Also my witness was not there to be able to testify cause after it being so long and me being locked up I had no way of staying in touch and knowing where his whereabouts are and since he was not able to testify for me I looked like I had no alibi and people showed prejudiced to me."

Defendant's assertions concerning these facts are also not part of the appellate record and thus cannot be reviewed on direct appeal. (*Kelly, supra*, 40 Cal.4th at p. 126.) "To the extent his contentions allege ineffective assistance of counsel, this claim cannot be resolved on the present record. [Citation.]" (*Ibid.*)

(9) Defendant argues: "I am married to [S.K.]. They did not put in the sentence for the jury to decide it to be a Domestic Violence charge. Any altercation between spouses is Domestic Violence. We share property together. We share bank accounts together."

Defendant's argument is legally irrelevant. That he was married to S.K. does not mean he could not be convicted of robbing her or violating the restraining order.

(10) Defendant argues: "Lastly it brings to me the judges decition. I feel prejudiced from her. She not only gave the jury doughnuts one or more mornings. Doesn't matter what her intention was it can preswade the jury in a self-consious state to not think in a non bias way."

Defendant's allegation of bias on the part of the judge is not supported by the appellate record. (Cf. *Kelly*, *supra*, 40 Cal.4th at p. 126.)

(11) Defendant argues: "The judge also did not give me a fair sentencing. I should of had the low term sentencing. I had no prior strikes. No prior major history to warrant such reasons, and there should of had the option to have Domestic Violence as a charge for the Jury to choose. Also I was approved Probation and they looked at my history. The judge said also about my prior history with [S.K.], however everything with her were DA rejects or dismissals. I believe its bias and prejudiced for her to use those against me."

Once more, defendant's allegation of bias on the part of the judge is not supported by the appellate record.

With regard to the denial of probation: "The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see § 1203.1, subd. (b); Cal. Rules of Court, rule 4.414.) Here, defendant was statutorily eligible for probation, but the probation and sentencing report found him unsuitable and recommended probation be denied based in part on, "a continuous pattern of disregard for Protective Orders or other Court-imposed restrictions." The court carefully reviewed this recommendation, together with all of the other relevant considerations, and ultimately denied defendant's request for probation. In doing so, the court was acting well within its broad discretion.

As for the selection of the three-year middle term, instead of the two-year low term, "the choice of the appropriate term shall rest within the sound discretion of the

court." (§ 1170, subd. (b); see Cal. Rules of Court, rules 4.420, 4.421 & 4.423.) Under this sentencing scheme, the broad discretion afforded a trial court is subject to review only for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.] As under the former scheme, a trial court will abuse its discretion under the amended scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citation.]" (*Ibid*.)

Here again the court carefully reviewed all of the relevant considerations, including the circumstances in aggravation and mitigation, thoughtfully imposed the middle term and, as required, clearly stated on the record its reasons for doing so. Yet again, the court acted well within its broad discretion.

(12) Defendant argues: "Lastly [S.K.] was coached to not talk about any on going cases or anything related. [S.K.] brought up [M.K.] when we were currently engaged in a court case about her. She mentioned something about her safety."

This issue is analyzed and discussed in paragraph (3) above. Again, the court did not err. But even if the court had erred, the verdicts would not be reversed nor the judgment set aside, unless the "error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353, subd. (b).) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) No such miscarriage of justice occurred in this case.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.